AB LAH ALI

v.

YONG WAH SING

HIGH COURT MALAYA, MELAKA
KN SEGARA J
[CIVIL APPEAL NO: 12-7-1998]
10 JANUARY 2001

CIVIL PROCEDURE: *Pleadings - Importance of pleadings - Calculation of special damages as at date of trial*

EVIDENCE: *Documentary evidence - Proof should be by maker - Failure to challenge admissibility of documents marked as exhibits - Late objection raised at appellate stage*

The defendant appealed on the quantum of damages awarded by the sessions court, and the plaintiff cross-appealed as regards to both liability and quantum. The sessions court had fixed the liability for the accident as 50:50 between the parties.

Before the hearing, the plaintiff also filed by way of motion, to admit fresh evidence of facts and conviction of the defendant of an offence pursuant to s. 43(1) of Road Transport Act 1987 and its facts pertaining to the accident in issue in the appeal. The motion was allowed by the court.

Held:

[1] The mere fact that the defendant never saw the plaintiff; could not explain why his vehicle was five feet on the plaintiff's side of the road and an admission of the facts of the case relating to the Road Traffic Act summons case showed that the defendant should shoulder the larger portion of the blame. Liability was apportioned on the defendant at 80% and plaintiff at 20%.

[2] The plaintiff ought to have pleaded the actual loss of earnings he had suffered and amended the period of loss to the actual date of trial, at the date of hearing. If not for the fact that both parties had agreed to this head of loss, the court would not have allowed this head of claim in this appeal for there had been no precise pleading of the facts to be relied on at the trial.

[3] The defence submitted that certain evidence; *ie* some exhibits, were not admissible as the maker was not called to produce them on the basis that the witness, *ie* PW2 only took office as director on 19 December

1996 and exhs. P6A to E were issued on 2 November 1996, 20 November 1996 and 2 December 1996. Thus, PW2 could not have issued the exhibits (although PW2 stated in his evidence to have done so), as PW2 was not even the company director then.

[4] The defendant did not cross-examine PW2 as regards to the issuance of exhs. P6A to E and the circumstances relating to the issuance/existence of them. Its complete neglect, left that part of the testimony unchallenged.

[5] Objection to the admission of documents must be taken at the earliest practical stage during the trial. The objection was raised at the appellate stage for the first time, and was deemed too late.

[6] Even if the court was to rule that exhs. P6A to E were inadmissable (which the court did not), the direct testimonies of both PW2 and PW4 (the plaintiff) had not been challenged by the defence to cast any doubt that the plaintiff was in fact a lorry owner who drove his own lorry and earned a total sum of RM19,721 for a period of 68 days.

Case(s) referred to:
Ngooi Ku Siong (f) & Anor v. Aidi Abdullah [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294 ***(foll)***

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(c), (d)(ii)
Road Transport Act 1987, s. 43(1)

For the plaintiff - SK Gan; M/s Taye & Co
For the defendant - Raghbir Singh; M/s Raghbir Singh, Norizan & Co

Reported by Yow Ting Fong

JUDGMENT

KN Segara J:
This is an appeal by the appellant (hereinafter referred to as the "defendant") on the quantum of damages, both, general and special, awarded by the learned Sessions Court judge on 22 January 1998. There is a cross-appeal by the respondent (hereinafter referred to as the "plaintiff') as regards both, liability and quantum.

Before going into the merits of the appeal, the plaintiff applied by notice of motion on 14 June 1999 (encl. 13) to adduce fresh evidence. After hearing both parties, and reading their respective affidavits, this court granted the motion to adduce the fresh evidence, i.e.

i) the evidence of the conviction of the defendant of an offence pursuant to s. 43(1) of the Road Transport Act 1987 pertaining to the accident in issue in the appeal, *vide* Jasin police report No. 1629/96;

ii) the facts of the case, as presented by the prosecuting officer at the magistrate's court at Jasin, on 30 September 1998, against the defendant, referred to as "Fakta Kes Saman Jasin Report No: 1629/96.

Having allowed the motion, I shall first deal with the issue of the liability and have the same out of the way. From the photographs, sketch plan and key at pp. 66, 67, 68, 69 and 70 there is clear evidence that the defendant's vehicle was resting on the plaintiff's side of the road. There is no dispute that the front right wheel was clearly ten feet from the right edge of the road. In other words, the vehicle was five feet into the plaintiff's correct side of the road. This must be explained by the defendant and he merely says, "Tempat itu gelap tiada garisan puteh." Furthermore, to add insult to injury, the defendant, in examination-in-chief at p. 24 of the appeal record, says:

> Sampai ke Batu 13 saya dengar satu dentuman yang kuat dihadapan sebelah kanan saya.

Clearly, the defendant never even saw the headlight of the plaintiff but merely heard a sound – and yet, the trial judge has taken umbrage with the plaintiff who saw the lights of the defendant's motor-van (p. 22 of appeal record). The plaintiff, in cross examination at p. 23 of appeal record, said "Saya nampak van pada pertama kali - apabila saya adalah lebih kurang 20 kaki dari van itu" and he said he could see for a distance of 12 - 13 feet ahead of him.

The defendant, on cross examination, stated that the accident occurred on the plaintiff's correct side of the road – "kemalangan berlaku di tempat jalan motorsikal". Further, the defendant states that there were no brake marks on the road (p. 25 of the appeal record) and yet, when PW3 (Sjn. Hazam Khan Hawas Khan) gave evidence, the cross examination by defendant's counsel seems to have asked him why the brake marks are not seen on the photographs only! No suggestion even was made that the brake marks were not fresh and thus could not be those of the defendant's vehicle! Be that as it may be, the trial judge seems to have believed the defendant despite the evidence to the contrary.

The learned trial judge says that the accident would not have taken place if the plaintiff was travelling two feet from the side-table. Even if the plaintiff was travelling near the center of his road, i.e. 7 1/2 feet from the side-table, the accident could not have taken place at all, unless the defendant was travelling on the wrong side, i.e. encroached into the plaintiff's correct side. On p. 28 the trial judge says, "The plaintiff did not take any evasive action, therefore liability is 50:50." Is the error of the plaintiff as grave as that of

the defendant who took no evasive action and never saw the plaintiff until after the impact?

There is clearly no doubt that both vehicles were travelling at a speed in the dark road but, the mere fact that the defendant:

i) never saw the plaintiff,

ii) could not explain why his vehicle was 5 feet on to the plaintiff's side of the road, and finally,

iii) an admission of the facts of the case in the Road Traffic Act summons case in Jasin on 30 September 1999,

shows that the defendant must shoulder the larger portion of the blame and I apportion liability on the defendant, at 80% and the plaintiff, at 20%.

Quantum

The dispute on the quantum of damages awarded to the plaintiff must now be addressed and determined.

Injuries

The learned sessions court judge was right in taking into consideration the two injuries that were not mentioned in the first medical report i.e:

1) the fracture of the lower end of the (L) radius, and

2) a fracture of the (R) zygomatic complex/maxilla which has healed with depression and proximal migration of the maxilla presenting with asymetry of the face and malocclusion of the (R) upper teeth.

The defence counsel had, without taking into account these injuries, submitted that the sum of RM70,000 would be fair and reasonable. The sum of RM90,000 awarded by the Sessions Court judge is, in the light of the several injuries, fair and reasonable. The Sessions Court judge's award on this head of general damages is affirmed.

Future Operation

The cost of future operations was enumerated by the specialist and the cost of the same was given as RM18,000. The specialist did say that if the plaintiff sought treatment in the government hospital, then, the cost will be reduced by half. Nevertheless, the plaintiff is entitled to the full cost of his operation fees and it is for him to decide where he will obtain his treatment within Malaysia. The parties have both agreed that this head of damages will not attract pre-trial interest. Thus, the award of RM18,000 is affirmed but the interest will run from date of judgment.

Loss Of Earning

Both counsels have agreed that this head of loss be further subdivided into two categories:

1) actual loss of earning, for the period of 22 December 1996 to 22 July 1997 i.e. a period of 19 months, and

2) loss of earning capacity or loss of future earnings, as provided for in s. 28A(2)(c) and (d)(ii) of the Civil Law Act 1956.

Before attempting to assess the loss suffered by the plaintiff, the pleadings filed in this suit and the evidence adduced must be carefully studied. No where in the pleadings is it stated what the occupation of the plaintiff is and, it is also not stated if the plaintiff was in fact a lorry driver/lorry owner. However, it is to be observed that the plaintiff has led evidence that he owned a lorry and he drove the same. There was no strenuous dispute of these facts, as the plaintiff was not cross-examined on this. The evidence shall be examined in great detail when assessing the loss sustained by the plaintiff. The main dispute between the parties in this appeal is the quantum under this head of damages (loss of earnings). This item falls under both, special and general damages.

1) Actual loss of earnings is special damages and

2) Loss of earning capacity is general damages.

> General damages refer to the damage which the law "implies in wrongs actionable *per se*" and is averred in general terms in the pleadings without the necessity of quantifying the amount. They include future loss of earnings as well as damages for pain and suffering and loss of amenities. ... Special damages on the other hand have to be specifically pleaded and strictly proved. They refer to past expenses and loss of earnings. The exact loss must be pleaded where the precise amount of item has become clear before the trial. Loss of future earnings or post-trial loss differs from pre-trial loss which comes under special damages." per Syed Agil Barakbah FJ in *Ngooi Ku Siong (f) & Anor v. Aidi Abdullah* [1984] 2 CLJ 163.

In the pleadings, herein, the plaintiff has pleaded his loss of earning as a head of special damage but has not stated the amount or the period of loss. The plaintiff ought to have pleaded the actual loss of earnings he has suffered and amended the period of loss to the actual date of trial, at the date of hearing. The reason for this is to "crystallise the issue and to put the defendants on their guard and tell them what they have to meet when the case comes on trial" Syed Agil Barakbah FJ in *Ngooi Ku Siong (f) & Anor v. Aidi Abdullah, supra*. If not for the fact that both parties have agreed to this head of loss I would have not allowed this head of claim, in this appeal, for there has been no precise pleading of the facts to be relied on at the trial.

Be that as it may be, the parties have agreed on the multiplier to be used and have correctly used the provision of s. 28A(2)(d)(ii) Civil Law Act 1956 by using the figure 55 minus the age of the plaintiff at the time he was injured and dividing the remainder by the figure two to arrive at the number of years' purchase of 11. The parties have agreed that actual loss was for a period of 19 months and have further agreed that 113 months becomes the multiplier for the loss of earning capacity/loss of future earnings (132 minus 19). The parties are unable to agree on the multiplicand. In this appeal, the parties have requested the court to assess the multiplicand to be used for both periods (i.e. for the period of the actual loss and the period of the future loss).

Before actually assessing the multiplicand, the salient facts for assessment of same must be carefully reviewed. It is an undisputed fact that the plaintiff was 33 years old at the time of the accident and has given evidence that he is a lorry driver. In the examination-in-chief, the plaintiff said he drove lorry No. JEF 3175. He said he bought the said lorry under hire-purchase and pays a monthly instalment of RM2,688 to MBF, Melaka. He testified that he had hired out the said lorry to one Fajar Semanjong Sdn. Bhd (hereinafter called "Fajar"). He called the director of Fajar to testify (PW2). PW2 informed the court that the plaintiff was paid for the hire of his lorry at RM10 per trip. He further went on to say that for the period of hire the plaintiff earned about RM8,000 per month. PW2 then produced exh. P5 which set out the payments made to the plaintiff for the period of hire. PW2 clearly stated that Fajar had assigned a number to the plaintiff's lorry as DT 3042. He testified that he had issued three payment vouchers, the originals of which had been given to the plaintiff and copies had been kept in the office of Fajar. To earn the sum of RM4,576 for 15 days, the plaintiff made about 40 trips working about 12-13 hours a day. This evidence was **never** challenged or disputed by the defendant at all!!!

The cross examination of PW2 leaves a great deal to be desired. PW2 was questioned as to his appointment as a director of Fajar. The witness was required to produce:

1) Payment vouchers – marked as P6A to E

2) Returns giving particulars of the register of the directors, managers and secretary of Fajar - marked as P7

3) Memorandum and articles of association of Fajar - marked as P8

4) Draft balance sheet & profit & loss accounts of Fajar - marked as P9

The learned defence counsel now submits before me that, although the above listed documents were marked as exhibits, they are in fact not admissible, as the maker was not called to produce them. This submission is in particular

reference to exhs. P6A to E, the payment vouchers. The basis for this argument is that pursuant to exh. P7, PW2 only took office as director on 19 December 1996 and exhs. P6A to E were issued on 2 November 1996, 20 November 1996 and 2 December 1996. It is submitted that PW2 could not have issued the vouchers (although PW2 has stated in his evidence to have done so), as 'PW2 was not even the company director then'. Herein lies the fallacy of this argument. The defendant never cross examined PW2 as regards the issuance of exhs. P6A to E and the circumstances relating to the issuance/existence of these vouchers. The complete neglect to do so leaves that part of the testimony unchallenged. Just because PW2 was not a director of Fajar as at 2 November 1996 does not, *ipso facto*, follow that he was not in Fajar at all and has no personal knowledge of the facts testified to in court.

With respect to the submission on the admissability of the evidence of the documents, in particular, exhs. P6A-E, the witness PW2 stated categorically, "Saya ada keluarkan payment voucher – 3 keping." (see p. 18 of the appeal record). He was never challenged regarding this statement at all. Now, we are told to infer from exh. P7 that PW2 was not a director of Fajar at the date of exhs. P6A to E and, thus, he has no knowledge of the plaintiff's employment. At no time during the trial was the nature of PW2's employment questioned by the defence. Thus, to state that the exhs. P6A-E were merely tendered as exhibits and 'not properly proved', is even more shallow, as at the time of the proffered tendering the defence raised no objection. Objection to the admission of documents must be taken at the earliest practical stage during the trial. The objection here is being raised at the appellate stage for the first time, and it is too late.

Be that as it may be, and even if the court was to rule that exhs. P6A to E are inadmissable (which the court does not), the direct testimony of both PW2 and PW4 (the plaintiff) has not been challenged by the defence to cast any doubt that the plaintiff was in fact a lorry owner who drove his own lorry and had earned the total sum of RM19,721 for a period of 68 days. The plaintiff had earned RM290 per day, i.e. RM8,700 a month. The plaintiff testified that his hire-purchase instalment was RM2,688 per month. He would have had to pay income tax of RM198 per month, thus giving him a nett income of RM5,800.

As the parties have agreed to subdivide loss of earnings into:

1) actual loss, with an agreed multiplier of 19 months and

2) loss of future earnings, with an agreed multiplier of 113 months,

the court is only left to assess the multiplicand. Under the first subdivide the court finds the actual loss suffered as RM5,800 and, therefore, the plaintiff

will be entitled to RM5,800 multiplied by 19, that is, RM110,200 for actual loss of earnings. The award of the sessions court judge will be set aside and the plaintiff's appeal on this head is allowed.

As to the second subdivide, the court must assess the loss of future earnings as envisaged in s. 28A of the Civil Law Act 1956. The specialist (PW1) testified that the plaintiff is "not likely to resume work as a lorry driver. He can do other sitting, sedentary jobs, after the completion of the treatment."

It is here that there is a dearth of evidence regarding the attempts, if any, made by the plaintiff to secure a job suitable to his qualification and ability. The defence neither cross-examined the plaintiff on any possible employment nor did the defence suggest to the plaintiff that he was recalcitrant in failing to make any attempts to be gainfully employed. In any event, the plaintiff cannot just sit and say, "I have been disabled and I have no job, so I am entitled to an amount as much or as close to the actual loss sustained." The plaintiff is only entitled to loss of future earnings. Guided by the authorities cited and bearing in mind that the plaintiff was not just a lorry driver but also the owner of the lorry, I am of the view that his earnings would be more than that of an average lorry driver who did not own or possess a lorry. In the circumstances, I would assess the plaintiff's loss of earnings at RM2,000 per month. With an agreed multiplier of 113 months, the loss is, therefore, RM226,000.

The sessions court judge's award under this head is set aside and varied accordingly.

There is, therefore, a total award as follows:

1) Injuries (general damages)	- RM90,000
2) Future operations (general damages)	- RM18,000
3) Loss of earnings	
i) actual loss of earnings (special damages)	- RM110,200
ii) loss of future earnings (general damages)	- RM226,000

The liability has been apportioned as 20:80 in favour of the plaintiff. The awards herein will accordingly be adjusted as per the apportionment of liability. The awards will also carry the usual interests. Costs to plaintiff.

Order accordingly.